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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000991-MR

EMILY CONLEY — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 07-CI-00061

THOMAS CONWAY; DIANA CONWAY STAFFORD; ELAINE GREEN; ANN KRAMER; JACK CONWAY; MICHAEL B. CONWAY, INDIVIDUALLY; AND MICHAEL B. CONWAY, AS EXECUTOR OF THE ESTATE OF WILLIAM CONWAY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, Emily Conley, appeals an order of the Mason Circuit Court overruling her various claims against Michael Conway, the executor of the estate of their mother, Lexa Conway, and other beneficiaries of that estate (hereinafter collectively referred to as "Appellees"). Specifically, Emily alleges

that Michael failed to charge one of the ten beneficiaries for an advancement allegedly made prior to the decedent's death, participated in self-dealing and paid excessive and unjustified fees to others in the administration of the estate. After extensive review of the arguments and the record in this case, we find no error on the part of the trial court and we affirm.

Background

This case arises out of what became a very contentious challenge to the administration of the late Lexa Conway's (hereinafter "decedent") estate following her passing in 2007. In 1994, the decedent and her husband executed wills and a joint estate plan which divided the assets of their sizeable estates equally among their ten children. Under the estate plan, neither spouse could alter the manner in which property was distributed without the approval of the other. The decedent's husband died in 2002. A trust in his name, established prior to the estate plan, was eventually liquidated and distributed following a November 2007 Agreed Order among the beneficiaries. This trust would become the subject of separate litigation initiated by Emily in 2011.[1]

In 2006, with Emily as her power of attorney, the decedent executed a new will and created a new trust, to which she deeded several items of real property prior to her death. The decedent also named Emily as trustee; however, other than the unrecorded deeds of real property, the new trust remained unfunded.

[1] This action, case number 11-CI-00253, was dismissed by agreement of the parties only weeks later after Emily received her distribution from the trust. Part of the agreed order of dismissal stated that Emily was unable to bring further litigation regarding the trust at any time, in any court.

Following the decedent's death in 2007, Emily sought to record several deeds executed during her mother's lifetime and sought probate of the 2006 will. The Appellees initiated this action to reverse Emily's recording of the deeds. They also sought to prevent enforcement of the 2006 will on the basis that the decedent had been contractually forbidden from acting in contravention of the 1994 estate plan without approval from her husband.

In June of 2007, in an effort to expedite the administration of the estate and resolve concerns raised by both parties, an Agreed Order was signed and tendered. The co-executors of the decedent's estate, Michael and Patrick Conway, agreed to waive "any statutory fees that would otherwise accrue and/or be owed to them."[2] This constituted a waiver of approximately $200,000. The parties also agreed that the estate's attorney's fees would be capped at "80% of 3.5% of the gross estate" or approximately $112,000. Emily agreed to deed back the real property her mother had deeded to the new trust before her death; however, she failed to immediately do so, eventually complying in December 2007 under threat of contempt.

Between 2007 and 2012, the bulk of the estate was gradually sold and the proceeds distributed. However, Emily continued to raise issues relating both to her mother's estate, as well as her father's trust. Specifically, Emily repeatedly moved the court for review of expenditures made on behalf of the estate and for assets associated with her father's trust to be included in the present action.

[2] Patrick Conway passed away in 2009, leaving Michael as the sole executor of their mother's estate.

Regarding the latter, the trial court had already ruled that property from her father's trust could not be included in the estate litigation pursuant to the aforementioned Agreed Order of dismissal.

The trial court set all matters still unresolved for a final hearing on March 13, 2012. At the hearing, Emily testified that she was confident her sister received a $25,000 advancement while her mother was still alive, but that she could not produce a check or other documentation establishing that an advancement had been made, despite the fact that she was her mother's power of attorney and "bookkeeper." Additionally, Appellees produced several checks, signed both by Emily and her mother on dates shortly before the decedent's death, payable to Emily for amounts totaling $6,000. Emily testified that these were for expenses related to her mother's care.

Michael also testified regarding various decisions he made regarding care, maintenance and distribution of estate assets, including compensation of himself and others for preparing the estate's various properties for sale in 2009. Michael acknowledged that he entered bids to purchase estate property, and did so successfully on some after submitting the highest bid. He testified that he did not believe this constituted self-dealing or a breach of his fiduciary duty to the estate because it ensured that the estate received the best possible value for its property. Michael further testified that he reached out to various attorneys and accountants for assistance with estate-related matters. Documents submitted reflect that these individuals assisted the estate with yearly tax returns and various legal issues

which arose. Fees paid for accounting services in 2009 and 2011 totaled more than $5,000, while legal fees totaled only $380.00.

At the conclusion of trial, the court issued its Findings of Fact and Conclusions of Law. Finding in favor of the estate on all matters, the trial court reasoned: 1) that there was insufficient evidence that an advancement had been made; 2) that the court did not have jurisdiction over issues related to Emily's father's trust because it was the subject of previous litigation and had been ruled upon and therefore precluded from consideration under the doctrine of *res judicata*; 3) that Michael did not breach his duty to the estate in compensating himself and others for labor performed in preparing the properties for sale, as such work and such compensation was permitted under statute; and 4) that statute also permitted Michael to employ and compensate various professionals whose expertise assisted in administration of the estate. Accordingly, the trial court found merit in none of Emily's claims and she now appeals from that order, asking this Court to reverse and remand.

Standard of Review

On appeal, we review the trial court's Findings of Fact and Conclusions of Law entered on May 4, 2012. Appellate review of a trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure ("CR") 52.01; *see also Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998); *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005), and *Alvey v. Union Inv., Inc.*,

697 S.W.2d 145 (Ky. App. 1985). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Gosney* at 898. Substantial evidence constitutes proof of facts which have sufficient probative value to permit a reasonable person to reach a factual determination. *Clark v. Bd. of Regents of Western Kentucky University*, 311 S.W.3d 726 (Ky. App. 2010). The trial court's conclusions of law, however, are subject to *de novo* review and an appellate court owes them no deference upon review. *See Arnold v. Patterson*, 229 S.W.3d 923 (Ky. App. 2007).

Analysis

Emily presents her objection to the trial court's opinion in four parts: 1) Michael should be charged the $25,000 that he failed to withhold from the beneficiary who received an advancement of that amount pursuant to the 2006 will; 2) Michael improperly paid attorney's fees over and above the amount permitted in the 2007 Agreed Order; 3) Michael should be removed for breach of his fiduciary duty and for self-dealing following his purchase of estate property as well as payments made to himself from the estate totaling more than $9,000; and 4) the Agreed Order of June 2007 should control the disposition of these matters, including payment of fees. We handle each of Emily's arguments in turn.

Emily first contends that the 2006 will that her mother executed required $25,000 to be withheld from one beneficiary's distribution due to an advancement made during her lifetime. Because he failed to withhold these funds, Emily contends, Michael must be held financially responsible for the $25,000. We disagree.

While we find the trial court's reasoning for denying Emily relief on these two arguments to be sound, we ultimately reject Emily's argument on appeal due to the manner in which it is presented. CR 76.12 requires litigants to provide this Court with "ample supportive references to the record and citations of authority pertinent to each issue of law." CR 76.12(4)(c)(v). For her argument regarding the alleged advancement, Emily provides no citation to authority. Rather, her argument consists merely of conclusory statements and favorable facts without indicating to this Court what legal authority entitles her to relief on those facts. Without more, we are unwilling to evaluate further the trial court's wisdom in denying Emily relief on the issue of an advancement.

Emily next takes exception with Michael's employment and payment of attorneys other than the estate's attorney. Emily argues that payment of these individuals violated the 2007 Agreed Order's cap on attorney's fees. In support of her claim, Emily cites to Supreme Court Rule (SCR) 3.130(1.5e),[3] which states,

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:

[3] Emily incorrectly cites this language as originating from SCR 3.130(1.5d). We presume, due to the language she quotes in her brief, that she intended to cite 3.130(1.5e).

(1) the division is in proportion with the services performed by each lawyer, or, each lawyer assumed joint responsibility for the representation;

(2) the client agrees to the arrangement and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

In response to this, Michael cites to KRS 395.195, which provides executors with the authority to "employ persons, including attorneys, auditors, investment advisors, or agents, to advise and assist the personal representative in the performance of his administrative duties…." KRS 395.195(18). The only limitation which this statute places on an executor in his/her decision to seek the assistance of such professionals is that, in doing so, the executor must be "acting reasonably for the benefit of the interested persons…." KRS 395.195.

We disagree with Emily's argument that Michael violated SCR 3.130, the Agreed Order of June 2007, or his duty to the estate by paying professional fees above the amount provided for in the Agreed Order. We first conclude that Emily's attempt to portray the matter as one solely concerning ethics is misguiding and unsupported. Other than citing to SCR 3.130, Emily fails to provide any evidence whatsoever that the estate attorney failed to comply with the terms of the rule. Furthermore, we reject Emily's argument that the estate's attorney, whose fee was addressed and capped under the Agreed Order, should have handled every single issue, of whatever legal nature, that availed itself of the estate. The Agreed Order capped "[f]ees to Jeffrey L. Schumacher" but did not cap or prohibit, as

Emily seems to contend, payment of reasonable fees to other professionals whose services the estate might require.

The administration of estates, especially ones as significant and as complex as this one, requires attorneys trained in a variety of fields, as well as accountants and other professionals whose expertise lends itself to the multitude of issues whose solutions lie beyond the legal and financial realm. KRS 395.195 provides an executor or personal representative of an estate discretion to "reasonably" seek out the advice of such individuals in the interest of expeditiously, competently, ethically and legally discharging the duty he or she owes to the estate. The trial court was correct in concluding, based on the evidence in the record, that Michael did so in the present case. Michael's decision, or the estate attorney's decision, to seek the assistance of additional professionals was reasonable and did not violate any provision of the 2007 Agreed Order, which solely concerned the fee received by the estate attorney. Therefore, it was within the considerable discretion provided to Michael under statute, and the trial court did not err in so finding.

We now turn to Emily's argument that the trial court erred in failing to remove Michael as executor on the basis that he participated in self-dealing and possessed interests contrary to those of the estate. As a factual basis for this argument, Emily points out that Michael, during his time as executor of the estate, billed the estate and compensated himself with twelve checks totaling $9,000 drawn on the estate's account. However, upon examining the nature of these

transactions and the reasons for them provided in the record, the trial court found no self-dealing in violation of Michael's duty to the estate. The record supports the trial court's conclusion.

As the trial court pointed out in its opinion, KRS 395.150(2) states:

> 2) Upon proof submitted that an executor, administrator or curator has performed additional services in the administration of the decedent's estate, the court may allow the executor . . . such additional compensation as would be fair and reasonable for the additional services rendered, if the additional services were:
>
> (a) Unusual or extraordinary and not normally incident to the administration of a decedent's estate; or
>
> (b) Performed in connection with real estate….

The record, consisting of various documents and testimony given at trial, reflects that Michael performed labor and incurred expenses in maintaining the estate's various properties throughout 2009. His work included "bush hogging" and general cleanup of the properties, which required fuel, materials, equipment rental, wages paid to helpers and the use of his own equipment. This work was done with the clear objective of maintaining and improving the properties for eventual sale at a price most advantageous to the estate. Furthermore, Michael kept meticulous record of these expenses and the purposes for them. Therefore, we see, and the trial court correctly found, nothing unreasonable or unfair in Michael's fees for laborious tasks involved in readying the estate's properties for sale.

Emily also contends – and Michael acknowledged at trial – that he attempted to buy, and in some cases did purchase, estate property by placing the

highest bid. Emily argues on appeal that this constituted self-dealing and required his removal as executor. However, upon reviewing the record, we find that this issue was, at best, vaguely pled to the trial court; and though testimony at trial indicated that Michael bid on properties owned by the estate, the trial court made no finding regarding whether this constituted self-dealing, Emily filed no motion for additional findings pursuant to CR 52.02, and Emily did not raise the matter in her prehearing statement on appeal, as required under CR 76.03(8). Therefore, we find that Emily's allegation of error regarding Michael's bidding on estate property cannot be considered by this Court, as it is both unpreserved and not included among those issues to which she must be limited under CR 76.03.

Finally, Emily contends that the parties' 2007 Agreed Order must control the administration of all estate property, including that of the trust established by her father, William, prior to 1994. Specifically, she argues that the 2007 Agreed Order required not only that Michael waive his executor's fee but also that he and the trustees of their father's trust waive all trustee's fees. In addressing the matter, the trial court pointed out that Emily's several prior motions to this effect had been overruled and eventually became moot with the liquidation of the trust and initiation of a separate lawsuit filed by Emily in 2011 which was later settled by a separate agreed order. That agreed order provided, "no further claims in any way regarding this trust may be brought in any court." Accordingly, the trial court found that the doctrine of *res judicata* precluded Emily from seeking

application of the Agreed Order's provisions to her father's trust property. We agree with the trial court.

All issues related to Emily's father's trust were addressed in separate litigation which has long been settled and the trust liquidated. In addition to these facts, Emily again offers only conclusory statements in support of her argument that, not only should the terms of the 2007 Agreed Order be enforced regarding fees charged by former trustees, but they also require inclusion of her father's trust property in that of her mother's estate. In addition, we find the trial court's finding regarding *res judicata* very persuasive. Though Emily believes the trust property should have been included and though she believes the provisions of the Agreed Order required the trustees to waive their statutory fees, these matters were decided in 2011 and she chose not to appeal that decision. This being the case, she is precluded from bringing claims relating to her father's trust "in any way . . . in any court" - including this one.

Conclusion

Having reviewed the record and arguments presented in this case, we find that the trial court did not err in finding against Emily and in favor of the Appellees at trial and in response to the litany of motions Emily filed in association with this, and other, cases. While the desire for such a result did not enter into our legal calculation of this contentious and drawn-out case, we hope our decision will, at last, bring an end to the exhaustive litigation and considerable cost endured by all parties involved.

The order of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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